



March 31, 2000

Ms. Elaine S. Hengen
Assistant City Attorney
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-1263

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Texas Government Code. Your request was assigned ID#133551.

The City of El Paso Police Department ("the department") received a six-part request for an incident report, for records relating to the department's Public Integrity Unit, and performance evaluations relating to two officers. You state that you are prepared to release some of the information but claim that the remainder is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample of information.¹ You have submitted the sample information as Exhibits "C" through "O" and "R" through "V." Exhibits "A," "B," "P" and "Q" are not responsive to the request.

Request Items 1, 2, and 3 deal with the department's Public Integrity Unit (the "unit"). You assert that you have released information responsive to Item 1. Item 2 seeks all records created by the unit. You assert ninety-five reports are responsive to this item and you have provided us a representative sample of these reports. Exhibits "C" through "K" are responsive to Item 2. You state many of these reports are the subject of ongoing investigations while the remaining reports involve only closed investigations that did not result in conviction or deferred adjudication. All ninety-five reports, you assert, are exempt from disclosure pursuant to Government Code section 552.108(a)(1) and (2).

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.108(a)(1) excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime if release of the information would interfere with the detection, investigation, or prosecution of crime. Accordingly, we find that release of the requested information from the reports relating to pending investigations would interfere with the detection, investigation, or prosecution of crime. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we conclude that the department may withhold this type of information under section 552.108(a)(1).

Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. The remaining cases that you contend concluded in a final result without convictions or deferred adjudication are also exempt from disclosure.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. --Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976). You may withhold the reports represented by Exhibits "C" through "K," but the department must release the basic information from each report except as discussed below.

You also assert that these documents presented for our review, including Exhibit "D," contain information protected from disclosure by sections 552.101 and 552.130 of the Government Code. Though not subject to release as basic information, we note the social security numbers in the documents may be confidential if they were obtained or are maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(vii); see Open Records Decision No. 622 (1994). Section 552.130, also not basic information, excepts information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state. You must withhold the driver's license numbers in the submitted documents under section 552.130 and the social security information under section 552.101 if obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

Despite section 552.108(c), three of the cases submitted involve crimes of sexual assault. You have submitted these reports at Exhibit "E". Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate

concern to the public. *Id.* Any information tending to identify sexual assault victims must be withheld pursuant to common law privacy. *See* Open Records Decision No. 393 (1983). Consequently, you must withhold information on these reports tending to identify sexual assault victims.

Likewise, another report, identified as Exhibit "F," contains information of a highly personal nature that qualifies for protection under the common law privacy. We have marked the information that must be withheld under section 552.101 in Exhibit "F."

Several of the reports contain information relating to city employee personal information. You have submitted representative samples as Exhibit "G." Again, this information is not subject to release as basic information. However, you assert section 552.117 also protects this information which you have highlighted. Section 552.117(1) excepts from disclosure information that relates to the home addresses, home telephone numbers, social security numbers, and family information of employees of a governmental body who request that this information remain confidential under section 552.024. Section 552.117(2) protects information related to peace officers without the requirement of an election. You have not submitted to this office information that demonstrates that, prior to the date on which the department received the requests for information, the department employees elected to keep their home addresses, home telephone numbers, social security numbers and family membership confidential. You may only withhold this information if the employees made such an election before the information request was submitted, unless the employees are peace officers, in which case you must withhold the information regardless of an election.

Exhibit "H" consists of a report containing information relating to an incidence of alleged child abuse. Section 261.201(a) of the Family Code provides that a report of alleged or suspected abuse or neglect and the identity of the person making the report is confidential. Further, the files, reports, records, communications, and working papers used or developed in an investigation of reported child abuse or in providing services as a result of an investigation of child abuse are confidential. The requested information consists of an incident report used or developed in an investigation made under chapter 261 of the Family Code. Because you have not cited any specific rule that the department has adopted with regard to the release of this type of information, we assume that no such regulation exists. We therefore conclude that Exhibit "H" is confidential under section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (construing predecessor statute). Accordingly, the department must withhold the incident report from disclosure in its entirety under section 552.101 of the Government Code as information made confidential by law.

The department asserts that two of the documents, submitted as Exhibit "I," contain information regarding juvenile offenses. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions such as Family Code section 58.007. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007.

The information at issue in one of the reports involves juvenile delinquent conduct that occurred after September 1, 1997. It does not appear that any of the exceptions in section 58.007(b) apply; therefore, this report is confidential pursuant to section 58.007(c) of the Family Code. You must withhold this information from disclosure under section 552.101 of the Government Code. However, one of the two reports does not appear to involve a juvenile offender. Reports involving juvenile victims and complainants are not protected from disclosure by Family Code section 58.007. This report is not covered by section 58.007(c) if it does not involve a juvenile offender.

The report listed as Exhibit "J" relates to pending litigation involving the city. You assert section 552.103 exempts the information from disclosure. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. To show that section 552.103 is applicable, the governmental body must demonstrate that: 1) litigation is pending or reasonably anticipated at the time of the request, and 2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You submit that litigation is pending against the city in cause number 99-060078 and involves the facts at issue in the incident report found at Exhibit "J." You have not provided a copy of the original petition or the body of the incident report itself. However, you assert this office has previously ruled that you may withhold this information from disclosure under section 552.103 in Open Records Letter No. 99-3188 (1999). You assert the same litigation is still pending and that the information has not been released through discovery. You may continue to rely upon Open Records Letter No. 99-3188 (1999) and withhold the requested information from public disclosure under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Exhibit "K" consists of records which you characterize as internal memoranda summarizing the case, the facts, and an officer's opinions relating to the ninety-five cases responsive to Item 2. You contend these memoranda, though filed separately from the incident and supplemental reports, contain the same information and are exempt from disclosure pursuant to section 552.108. Our review of the records identified as Exhibit "K" indicates these memoranda satisfy the requirements set out in section 552.108(a)(1) and (2). You may

withhold the memoranda. You must release the basic information associated with the investigation reports contained in Exhibit "K."

Item 3 is duplicative of Items 1 and 2. You have provided a report labeled Exhibit "L" as responsive to Item 4, a request for information related to the requestor's arrest. You indicate that you will release most of the incident report. You claim that the remaining portion is protected by section 552.108. As noted above, you may withhold all but basic information from this report under section 552.108. You relate that this investigation did not result in conviction or deferred adjudication. Further, you assert this report contains phone company generated information made confidential pursuant to section 772.318 of the Health & Safety Code. In Open Records Decision 649 (1996), we concluded that only the originating telephone numbers and addresses gained by the 9-1-1 district's use of the phone company's database are confidential and the governmental body must withhold this information from the requestors. Section 772.318 does not except from disclosure all information obtained during a 9-1-1 call.² As stated above, however, the report is excepted from disclosure, less basic information, under section 552.108. You must withhold the confidential 9-1-1 information if you decide not to withhold the report under section 552.108. *See Gov't Code § 552.007.*

Item 5 seeks police internal affairs records relating to complaints filed against two police officers. Exhibits "M," "N," and "O" are responsive to Item 5. The first report, submitted as Exhibit "M," contains a summary of evidence relating to a charge that two officers failed to make a report of suspected child abuse. You assert that the entire report is exempt from disclosure pursuant to section 552.101 and section 261.201 of the Family Code. A review of the documents supplied for our review indicates that not all of the information was generated for the purpose of investigation of child abuse, and thus, are not governed by chapter 261. The reports themselves contain information relating to an incident in which officers were called by Child Protective Services to investigate a report of child abuse. The investigation focuses on the officers' failure to make a written report detailing the incident. While there is contained in the internal affairs documentation information relating to the alleged child abuse, some of the information was not created for that purpose. Chapter 261 affords confidentiality to "an investigation of reported child abuse." Some of the responsive documents are not such an investigation. However, some of the documents are protected by section 261.201. We have marked the information that must be withheld. The remainder must be released.³

²Subchapters B and C contain similar confidentiality provisions. *See Health & Safety Code §§ 772.118, .218.* Notably, however, subchapter E, which applies to counties with populations over 1.5 million, does not contain a confidentiality provision regarding 9-1-1 telephone numbers and addresses. *Health & Safety Code § 772.401, et seq*

³You also claim that Exhibit M may be withheld under sections 552.103 and 552.108. You have provided us with no comment to explain how these sections apply to the internal record. Therefore, you may not withhold the remaining information under these exceptions.

Exhibit "N" consists of a report of an internal affairs investigation of the two officers and the written reprimands. You assert the social security numbers contained in the report must be withheld. As noted above, social security numbers may be confidential if they were obtained or are maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990, 42 U.S.C. § 405(c)(2)(C)(vii); *see* Open Records Decision No. 622 (1994), or if they are protected by section 552.117 of the Government Code. You must withhold the Social Security Account Numbers covered by either provision. The remainder of the information must be disclosed.

You contend the document labeled Exhibit "O" is responsive to the request, but the subject of an ongoing internal criminal investigation regarding a department officer. You explain that both the identifying offense and the charges against the named officer are subject to the ongoing criminal investigations. You also assert the document is exempt from disclosure under section 552.101 as subject to common law privacy. You have provided this office only with the front page of the document, not the document in its entirety. Also, you have not supported your assertion with evidence or argument. We are unable to conclude that section 552.101 is applicable. As described above, however, you may withhold the document pursuant to section 552.108(a)(1). You must, nonetheless, release basic information. Because we have resolved this request under section 552.108, we need not consider your argument under section 552.103.

Item 6 of the request seeks records relating to the job performance of two peace officers. Exhibits "R" through "V" are responsive to this item. You assert that portions of these reports are exempt from disclosure pursuant to sections 552.101, 552.117, and 552.130. Consistent with our preceding discussion, we have marked the vehicle identification numbers, driver's license numbers, and social security numbers that must be withheld in Exhibits "R" and "S." Furthermore, juvenile offender information, child abuse information, and information protected by common law privacy must be withheld and is marked in Exhibits "T," "U," and "V." As previously stated, information regarding juvenile offenders is confidential and must be withheld under section 552.101 and section 58.007 of the Family Code. Exhibit "T" relates an incident involving juvenile offenders and must be withheld in its entirety. Exhibit "U" contains information protected by common law privacy. *See* Open Records Decision No. 422 (1984). We agree that your markings have properly identified the information exempt from disclosure pursuant to common law privacy. Exhibit "V" contains references to incidents of possible child abuse. As stated above, section 261.201 of the Family Code makes information relating to child abuse confidential. You must withhold the information that you have marked in Exhibit "V." The remainder of the reports must be released.

In summary, with the exception of the basic front page offense and arrest information, you may withhold the requested criminal investigation information from disclosure based on sections 552.108(a)(1) and (2). Information identifying victims of sexual assault and other information identified as being protected must be withheld under section 552.101 pursuant to common law privacy. Information regarding juvenile offenders is confidential and must

be withheld under section 552.101 and section 58.007 of the Family Code. Information regarding child abuse must be withheld pursuant to section 261 of the Family Code. You must withhold confidential social security numbers under section 552.101, Texas driver's license numbers under section 552.130, and phone company generated information made confidential pursuant to section 772.318 of the Health & Safety Code. Section 552.117 excepts from disclosure certain personal information regarding city employees, if the employee made a written election to withhold this information prior to the information request, unless the employee is a peace officer, in which case the information must be withheld. We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007. Where appropriate, we have marked those documents submitted for our review indicating the information that must be withheld.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

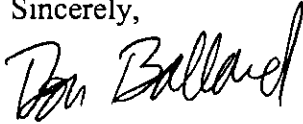
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Deputy Chief, Open Records Division

JDB/CHS/ljp

Ref: ID# 133551

Encl. Submitted documents

cc: Mr. Larry Medina
7404 Parkland
El Paso, Texas 79925
(w/Open Records Letter No. 99-3188 (1999))